No. 95-1872

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE HONORABLE WILLIAM STRATE,
Associate Tribal Judge of the Tribal Court
of the Three Affiliated Tribes of the Fort
Berthold Indian Reservation, *et al.*,
Petitioners,

v.

A-1 CONTRACTORS and LYLE STOCKERT,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian tribal court has jurisdiction to adjudicate a tort suit brought by a nonmember plaintiff against a nonmember defendant arising out of an automobile accident that occurred on a state highway within the reservation.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. Many of *amici*'s members exercise civil and regulatory authority in areas in and near the reservations of Indian tribes. Indeed, it is not uncommon that large numbers of non-Indians reside within reservation boundaries, *see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978), and that States and local governments have built and maintain highways, schools and other facilities within reservation boundaries. *See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

The scope of tribal civil jurisdiction over nonmembers is of concern to *amici* for several reasons. First, it affects substantial rights of citizens and entities who are not members of the tribal community. In addition, States and local governments and their officials have found themselves, with increasing frequency, defendants in civil actions brought in tribal court to challenge a wide range of exercises of state authority. *See, e.g., Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (county tax challenged by tribal member in tribal court); *Montana v. Gilham*, 932 F.Supp. 1215 (D. Mont. 1996) (tribal court negligence action against State for failure to maintain state highway within reservation), *appeal docketed*, No. 96-35766 (9th Cir. July 18, 1996); *Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 WL 600865 (D. Nev. Sept. 30, 1996) (State and state officials sued in tribal court for constitutional and other torts).

To the extent tribal courts assert jurisdiction over such suits, these cases raise a host of issues protracting the disputes and increasing the costs of their resolution. The determination of whether tribal court jurisdiction exists in this case thus has important implications for the law governing a wide range of non-tribal activity occurring within reservations.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

This case has its foundation in the nature of the sovereignty exercised by Indian tribes. Consistently, from very early cases decided by this Court, Indian tribes have been adjudged to have an inherent retained sovereignty of a unique, dependent, and limited character. By contrast, the federal government and States have been acknowledged to possess a sovereignty that is plenary and unlimited. The difference in the nature and character of these two types of coexisting sovereignties, that of Indian tribes on the one hand, and that of the federal government and States on the other, has been critically important in cases beginning with *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), both of which addressed title to land, through *Montana v. United States*, 450 U.S. 544 (1981), holding that the Crow Tribe lacked power to regulate hunting and fishing on lands held in fee by persons who were not members of the Tribe.

The limited and dependent inherent sovereignty exercised by Indian tribes is based primarily on tribal membership and has a limited territorial aspect that is not sufficient by itself to confer jurisdiction over nonmembers. Of course, this limited sovereignty may be supplemented or diminished by specific acts of Congress.

Montana crystallizes these judicial precepts into "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U.S. at 565, and the correla-

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

tive basic rule that tribes may exercise that power which "is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. Two exceptions to that rule allow tribal regulation of "nonmembers who enter consensual relationships with the tribe or its members" and of conduct by nonmembers that "threatens" or has some "direct effect" on the political integrity or welfare of the tribe. *Id.* at 565-66. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987), does not establish any rule contrary to *Montana*, because *Iowa Mutual* acknowledges that tribes possess only "attributes of sovereignty" as contrasted to the plenary sovereign power of a State or the federal government.

This case tests the boundaries of the *Montana* rule. It focuses on tort claims brought in tribal court by a nonmember plaintiff against a nonmember contractor arising out of an auto accident on a state highway traversing land within the reservation of the Three Affiliated Tribes. The court of appeals correctly ruled that the tribal court did not have power to adjudicate the civil claims of nonmembers of the tribe based merely on territoriality, *i.e.*, the fact that the accident occurred within the boundaries of the reservation.

Petitioners and the United States have suggested that tribal courts may have an "adjudicatory" jurisdiction where the tribes' limited sovereignty does not apply, but there is no basis for such a position. This Court has carefully avoided any recognition of a concurrent jurisdiction of tribal courts with either federal or state courts. Among other things, tribal courts are not bound by the Supremacy Clause, the Full Faith and Credit Clause, or the Rules of Decision Act, and review of tribal court decisions is not available in federal or state court to test application of the Due Process Clause. Also, "adjudicatory" jurisdiction necessarily does have a "regulatory" content, as illustrated by the obligation to determine tort law in this case.

Neither do the *Montana* exceptions provide a basis for tribal court jurisdiction. Traveling on a state highway within a reservation does not trigger the "consensual relationship" prong of *Montana*—simply using a state highway is not sufficient. And although the respondent contractor had a contract with a tribal entity, basing tribal jurisdiction on an attenuated *but for* causation arising from the contractor's travel on the highway would sweep into tribal court any cause of action based on the contractor's mere presence. Similarly, the facts do not threaten or directly affect the political integrity or welfare of the tribe. There is not a "direct effect" on the tribe within the meaning of the *Montana* exceptions. In this respect, and others, the decision in this case will have important implications for current and future recreational and commercial activity involving nonmembers occurring within and around tribal reservations and enclaves.

ARGUMENT

I. TRIBAL COURT JURISDICTION EXTENDS ONLY TO MATTERS HAVING A DIRECT EFFECT ON TRIBAL INTERESTS

A. Indian Tribes Do Not Possess Plenary Sovereign Powers, But Rather Retain Only A "Unique and Limited" Sovereignty That Focuses On Tribal Matters

Since the early nineteenth century, this Court has consistently held that Indian tribes do not retain sovereignty of the kind possessed and exercised by the state and federal political entities which form the Union. *See Montana v. United States*, 450 U.S. 544, 563-65 (1981); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810) (Marshall, C.J.); *id.* at 143, 146-47 (Johnson, J., concurring). Plenary sovereign power did inhere at one time in the aboriginal Indian nations that inhabited the territory

of what is now the United States. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) ("Before the coming of the Europeans, the tribes were self-governing political communities."). But the tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *Id.* at 323. The sovereign power remaining after the tribes' incorporation into the United States "is of a unique and limited character." *Id.* Thus, in *Wheeler* the Court ruled that the Double Jeopardy Clause of the Fifth Amendment did not bar a federal prosecution of an Indian who previously had pleaded guilty to a lesser crime in tribal court, because the United States and the tribe were different sovereigns, albeit not of the same type.

The dependent and limited nature of tribal sovereignty was also the basis for decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which this Court ruled that tribal criminal powers do not extend to non-Indians. In *Oliphant*, a case decided contemporaneously with *Wheeler*, the Court reaffirmed that within the geographical limits of the United States,

> "[t]he soil and peoples . . . are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two."

435 U.S. at 211 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)). Thus, tribes could not exercise criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208.

Thereafter, in *Montana*, this Court ruled that the attributes of the "unique and limited" sovereignty of an Indian tribe are defined by the tribe's requirements for *internal* governance; *i.e.*, regulation of the tribe as a whole and the relations among its members. As to matters external to the tribe and its members, the Court, drawing on

a long line of precedent, articulated "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. As this Court stated in *Montana*:

> [I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

450 U.S. at 564 (citation omitted).

Montana goes on to set forth two categories of cases in which the exercise of tribal sovereignty is not "inconsistent with the dependent status of the tribes":

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

450 U.S. at 565-66 (citations omitted).

B. The Limited, Dependent Sovereignty Of Indian Tribes Is Not Based On Territoriality

As defined and expounded in *Wheeler*, *Oliphant*, and *Montana*, the limited sovereignty of an Indian tribe is not based on territory. Rather, it is based primarily on tribal membership and has a limited territorial aspect that is not sufficient by itself to confer jurisdiction over nonmembers.

By contrast, the sovereignty exercised by a State, both in theory and in fact, traditionally includes "the power to hale before its courts any individual who could be found within its borders," and to "retain jurisdiction to enter judgment against him, no matter how fleeting his visit." *Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990) (plurality opinion).

Territorial jurisdiction is the mark of an unlimited, broad sovereignty, not that of a limited, dependent one. As this Court noted in *Oliphant*, the limited sovereignty exercised by the Indian tribes addresses members and no longer includes "the right of governing every person within their limits." *Oliphant*, 435 U.S. at 209 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 147 (Johnson, J., concurring)). Such a "basic attribute" of unlimited sovereignty —"the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens"—is inconsistent with the tribes' dependent status. *Duro v. Reina*, 495 U.S. 676, 685 (1990).

Thus, it is emphatically not the law of this Court that, "[i]n the absence of a contrary treaty or Act of Congress, an Indian Tribe retains plenary sovereign authority, both legislative and adjudicatory, over all Indian and non-Indian activities on tribal lands." U.S. Br. 24.[2] And,

[2] The United States addresses tribal sovereignty in comparative terms—equating tribal authority to that of a State. *See* U.S. Br. 20. This equation runs directly counter to this Court's jurisprudence, including especially *Kagama* and its explicit holding that in the United States only the federal government and States exercise unlimited sovereignty, and Indian tribes do not. *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty At The Millennium*, 96 Colum. L. Rev. 809, 827-28 (1996).

Of course, Congress by statute may for some purposes assign tribes a role under federal legislation that is roughly equivalent to that of a State, but it must do so explicitly. *See Backcountry Against Dumps v. Environmental Protection Agency*, —— F.3d ——, 1996 WL 621924 (D.C. Cir. Oct. 29, 1996) (Resource Conservation and Recovery Act defines Indian tribes as municipalities, not States, and EPA action approving solid waste permitting plan

similarly, it is not the law that "[a]bsent congressional divestment, a tribe's inherent sovereignty extends to both its members and its territory." Pet. Br. 9. On the contrary, "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express Congressional delegation,' and is therefore *not* inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (quoting *Montana*, 450 U.S. at 564). As this Court emphasized in *Oliphant*, "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments"; instead, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'*" 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)); *see also National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 n.14 (1985) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.") (quoting *Wheeler*, 435 U.S. at 323).

In sum, an Indian tribe has no "plenary" or "inherent" sovereign authority over a nonmember other than the limited authority consistent with the doctrine of *Montana*. The tribes may retain "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," but only in matters involving "consensual relationships with the tribe" or having a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. Even with respect to activities occurring within the confines of a reservation, therefore, exercise of jurisdiction by an Indian tribe over nonmembers requires first that a compelling tribal interest be identified under *Montana*. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (addressing

submitted by Campo Band of Mission Indians was invalid because only States may submit such permitting plans for Agency approval).

inconsistent county and tribal zoning regulations with relation to land owned in fee by non-Indians located within the boundaries of a reservation).

The Court's dictum in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), on which both the petitioners and the United States heavily rely, Pet. Br. i, 13, 15, 20; U.S. Br. 13, 17-19, 24, must be understood in light of this Court's consistent rule—adhered to both before and after *Iowa Mutual*—that the Indian tribes possess only a "unique and limited" sovereignty. *Wheeler*, 435 U.S. at 323. In *Iowa Mutual*, the Court held that in a dispute between a member of an Indian tribe and a non-Indian as to which the member has sought relief in tribal court, a federal court having jurisdiction under the diversity statute, 28 U.S.C. § 1332, should nonetheless forbear to exercise such jurisdiction pending the tribal court's assessment of its own jurisdiction. *See* 480 U.S. at 11-20.

Precisely because the relevant facts and issues as to the tribal court's jurisdiction were not before the Court, the Court announced no new principle in *Iowa Mutual* respecting the limits of tribal jurisdiction. While stressing the "federal policy favoring tribal self-government" to urge deference to tribal jurisdiction assuming it existed, 480 U.S. at 14, *Iowa Mutual* acknowledged that the tribes possess only "attributes of sovereignty," as opposed to the full sovereign power of a State or the federal government. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). Indeed, the Court cited and relied on the very portion of *Montana* that limits tribal jurisdiction over the activities of nonmembers to two discrete classes of cases:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-389 (1976). Civil jurisdiction over such activities presumptively lies in the tribal courts unless

> affirmatively limited by a specific treaty provision or federal statute.

480 U.S. at 18.

In context, the "tribal sovereignty" to which the Court refers in the quoted passage is only that residuum of "retain[ed] elements of 'quasi-sovereign' authority," *Oliphant*, 435 U.S. at 208, not extinguished with the tribes' aboriginal sovereignty by their incorporation into the territory of the United States. Thus, there is no "*Iowa Mutual* rule" (Pet. Br. 15) acknowledging any tribal sovereignty other than those "aspects of sovereignty" not generally divested "by implication as a necessary result of [the tribes'] dependent status." *National Farmers Union Ins. Cos.*, 471 U.S. at 853 n.14.[8] Not only in *Montana*, but in an un-

[8] Nor, contrary to petitioners' suggestion (Pet. Br. 18), is there any "*Montana* rule" that links divestiture of tribal sovereignty over the activities of nonmembers to occupancy by such nonmembers of land alienated from the tribe. The *Montana* Court's consideration of the General Allotment Act, 25 U.S.C. §§ 331 *et seq.*, was entirely separate from its discussion of "inherent sovereignty" of the tribes. *Compare Montana*, 450 U.S. at 559-61, *with id.* at 563-66. The tribe in *Montana* contended that Congress had created general tribal sovereignty over the territory of the reservation in question—and, by implication, incidental power to regulate fishing and hunting in such territory—under the 1868 Treaty of Fort Laramie, 15 Stat. 635, which granted the tribe "absolute and undisturbed use and occupation" of the reservation land. The Court held, however, that by authorizing alienation of reservation land to non-Indians under the General Allotment Act, Congress had abrogated any regulatory power that might otherwise exist under the Treaty. 450 U.S. at 559.

The same rule was followed in *Bourland*, in which the Court addressed whether the Cheyenne Sioux Tribe had authority to regulate hunting and fishing in an area adjacent to the Missouri River in which the federal government had developed a dam and flood control project. Construing treaty language identical to that in *Montana*, the Court held that "Congress ha[d] abrogated the Tribe's rights *under the Fort Laramie Treaty* to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project." *Bourland*, 508 U.S. at 687 (emphasis added). The Court went on to state that unless one of the exceptions set

broken line of precedents including *Oliphant*, *Wheeler*, *National Farmers Union Ins. Cos.*, *Bourland*, and *Brendale*, the Court has recognized tribal sovereignty only "to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations." *Bourland*, 508 U.S. at 694 (citing *Wheeler*, 435 U.S. at 326). The Court should not depart from that long-maintained rule here: the asserted jurisdiction of the Fort Berthold tribal court can be exercised only if it is consistent with the "unique and limited" sovereignty of the tribes, as delineated in *Montana*.

C. Tribal Courts Can Have No "Adjudicatory" Jurisdiction Where The Tribes' "Unique and Limited" Sovereignty Does Not Apply

The suggestion of the petitioners and the United States that a tribal court may exercise a separate "adjudicatory" jurisdiction over matters as to which the tribe has no sovereignty, Pet. Br. 22-26, U.S. Br. 15-24, lacks any basis in this Court's precedents and cannot withstand scrutiny. Consistent with the limited character of tribal sovereignty as contrasted to that of the federal and state sovereigns, the Court has assiduously avoided recognizing concurrent jurisdiction of tribal courts on the one hand, and federal or state courts on the other. For example, in *Williams v. Lee*, 358 U.S. 217 (1959), the Court held that a state court could not exercise jurisdiction—presumably concurrent with that of the tribal court—over a suit in contract brought by a non-Indian plaintiff against an Indian defendant. Refusing to recognize concurrent state and tribal court jurisdiction, the Court held that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. Similarly, in *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976) (per curiam), the Court rejected the possibility of "subject[ing] a dispute arising on the reservation among Indians to a forum other than the one they have established for themselves" on the ground that it "plainly would interfere with the powers of self-government" of the tribe.[4]

The Court has likewise precluded the federal courts from exercising jurisdiction concurrent with that of the Indian tribes. In *Iowa Mutual*, the federal court apparently had proper diversity jurisdiction in a suit between the insurance company, a citizen of Iowa, and the defendant member of an Indian tribe who resided on a reservation located in Montana. *See* 480 U.S. at 17-18 n.10 (after passage of Act of June 2, 1924, "under the Fourteenth Amendment, Indians are citizens of the States in which they reside"). Nonetheless, the Court rejected the possibility of concurrent jurisdiction:

> In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

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forth in *Montana* was applicable, "[g]eneral principles of 'inherent sovereignty' also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area." *Id.* at 694.

Thus, in both *Montana* and *Bourland*, the "tribal sovereignty" as to which the Court found a "divestment" by Congress (Pet. Br. 16) was not an inherent sovereignty but one that had been created by Congress through the Treaty of Fort Laramie.

[4] In inviting the Court to consider the prospect of concurrent jurisdiction, the United States comments that "[c]oncurrent jurisdiction is common in many contexts." U.S. Br. 17 n.10. The only case cited involving Indian courts is *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). That case recognized jurisdiction by state courts of North Dakota over a suit brought by the Three Affiliated Tribes. *See also infra*, n.5.

480 U.S. at 16 (citations omitted); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (despite federal claim under Indian Civil Rights Act, 25 U.S.C. § 1302, federal court has no jurisdiction over claim against tribal official other than writ of habeas corpus).

The Court's careful efforts to demarcate and separate the jurisdiction of tribal courts from that of the state and federal courts recognize that "adjudicatory" jurisdiction inevitably implicates questions of regulatory power and, ultimately, sovereignty. The most immediate example in this regard is raised by the prospect of execution of judgments. Issues of sovereignty were plainly raised, for example, by a tribe's seizure of property of a defendant state school district pursuant to the tribal court's writ of execution after judgment obtained in tribal court. *See National Farmers Union Ins. Co.*, 471 U.S. at 849 n.4.[6] Even outside the context of execution of judgments, however, this Court's cases have demonstrated time and again that the application and development by one sovereign's court of another sovereign's law raises questions as to the limitations on the first sovereign's power.

Thus, the federal courts are constrained by the Rules of Decision Act to apply state laws as rules of decision "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652. Notoriously, however, the practice of the federal courts prior to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938), "invaded rights which . . . are reserved by the Constitution to the several states." Similarly, States are constrained by the Supremacy Clause to

[6] Notably, in *Three Affiliated Tribes v. Wold Engineering*, the Court recognized jurisdiction of the state courts of North Dakota over a suit by the tribe against a non-Indian defendant, in part because "even if the Tribe were to have access to tribal court to resolve civil controversies with non-Indians, it would be unable to enforce these judgments in state court." 476 U.S. at 889.

honor federal causes of action to the extent they recognize analogous state law claims. *See Testa v. Katt*, 330 U.S. 386 (1947). And a state court's choice of its own law, in the absence of sufficient contacts between that State and the dispute before the court, may impermissibly "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

As between the state and federal sovereigns and among the several States, the Supremacy Clause, Full Faith and Credit Clause, Due Process Clause, and the Rules of Decision Act afford a framework for avoiding and resolving conflicts of sovereignty. But to the extent of a tribe's sovereignty, these fundamental precepts either do not apply in tribal court or cannot be enforced through review in state courts, or especially in the case of the Due Process Clause, federal courts. *See Santa Clara Pueblo*, 436 U.S. at 56. The resulting prospect that tribal court adjudication of disputes governed by state law will create conflicts with state regulatory powers counsels that tribal jurisdiction extend only to matters directly affecting tribal interests cognizable under *Montana*.

One especially important example of the conflict of laws problems raised by the possibility of concurrent state and tribal court jurisdiction involves the status in tribal courts of a state or local government's defense of sovereign immunity. State and local governments and their employees frequently work in and around reservation areas, both with members of the tribe and with nonmembers. A State's policies respecting the defense of sovereign immunity reflect a careful balance between the need to compensate those injured in connection with a State's activities and the public's interest in limiting the liabilities associated with governmental functions. A tribal court exercising

concurrent "adjudicatory" jurisdiction over an action against a state defendant might conclude that it is not required to respect that same balance of policies. This would be an incongruous result in a matter as to which it is assumed the tribe would have no sovereign "regulatory" power under *Montana*.

To be sure, a state government also cannot ensure that its sovereign immunity will be recognized in another State's courts. *Nevada v. Hall*, 440 U.S. 410 (1979). The *Hall* rule, however, follows from the principle that because the States are coequal sovereigns within the Union, there is no reason to conclude "that any one State's immunity from suit in the courts of another State is anything other than a matter of comity." 440 U.S. at 425. This approach is not warranted with respect to tribal sovereignty, which is neither plenary nor territorial, absent a protectable tribal interest under *Montana*.[6] Moreover, in a circumstance analogous to the present case—where the plaintiff is not a citizen of the State whose courts are exercising jurisdiction—the recognition of the defendant State's sovereign immunity defense should be required by the Full Faith and Credit Clause. *Cf. Hall*, 440 U.S. at 421-24 (discussing rule of *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932)). There is no assurance that such a constraint will be honored by tribal courts.

Conflicts between tribal law and state law as to sovereign immunity may thus arise in a suit by a tribal member against a State or local government in which tribal jurisdiction would otherwise exist under *Montana*. *Compare, e.g., Lewis County v. Allen*, No. 93-0382-N-HLR

[6] Similarly, even though state courts generally exercise concurrent jurisdiction with the federal courts in applying federal law, the distinct powers of sovereignty exercised by the States and the federal government bar a state court from exercising jurisdiction over an action in habeas corpus against a defendant federal official. *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

(D. Idaho Aug. 18, 1994) (tribal court has no jurisdiction over tort action by tribal member against county sheriff and other county officials); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996) (state sovereign immunity barred tribal court jurisdiction over negligent design action by the estate of a tribal member against state highway authority arising out of traffic accident occurring on reservation land), *with Nevada v. Hicks*, No. CV-N-94-351-DWH, 1996 Westlaw 600865, at *11 (D. Nev. Sept. 30, 1996) (tribal court had jurisdiction over tort claim against state game wardens; district court expressed no opinion as to "whether qualified immunity is available to the state defendants as a defense"). In circumstances such as the present, however, the potential for disparate treatment of state sovereign immunity counsels even more forcefully against the recognition of concurrent jurisdiction in state and tribal courts.

Indeed, ultimately both petitioner and the United States concede that "adjudicatory" jurisdiction exerts a "regulatory" force. Within a few pages of arguing that the tribe seeks only "adjudicatory," as opposed to "regulatory" jurisdiction, for example, the United States asserts that the tribe has an interest in "deter[ring] and remedy[ing] dangerous vehicular conduct through adjudication of civil disputes." U.S. Br. 24, 28. Similarly, the petitioners defend the Tribe's "sovereign right to determine the law of torts on the Reservation." Pet. Br. 29. Thus, "adjudicatory" jurisdiction necessarily does have a "regulatory" content, and one cannot be divorced from the other.

In this vein, *Montana* dictates against such an expansion of the tribes' sovereign powers through "adjudicatory" means. Just as *Williams v. Lee* held that state adjudication of primarily tribal matters would interfere with tribal sovereignty, the Tribe's assertion of jurisdiction in the absence of the requisite tribal interest under *Montana* both exceeds the limits of the "unique and limited" sov-

ereignty possessed by the Tribe and, *pro tanto,* interferes with the jurisdiction of the state and federal courts. Whether it is labeled "adjudicatory" or "regulatory," therefore, any "sovereign right" to be exercised over nonmembers of the Tribe must be justified under *Montana.*

II. THIS TORT SUIT NEITHER ARISES OUT OF A "CONSENSUAL RELATIONSHIP" BETWEEN THE TRIBE AND NONMEMBERS NOR DIRECTLY IMPLICATES TRIBAL INTERESTS AND, THEREFORE, IS NOT SUBJECT TO TRIBAL COURT JURISDICTION

In *Montana,* the Court set forth a two-part test to be used for determining whether a tribe's "inherent sovereign powers" permit the exercise of "civil jurisdiction over non-Indians on their reservation[]." 450 U.S. at 565. The *Montana* test limits tribal courts' jurisdiction over nonmembers to those situations in which the nonmember has entered into a consensual relationship with the tribe or has acted in a way that has some "direct" effect on tribal interests. *Id.* at 565-66. Neither of these prongs of the *Montana* test should be interpreted to permit tribal court jurisdiction in this case.

A. This Suit Did Not Arise Out Of The Tribe's Consensual Relations With Nonmembers

The "consensual relationship" prong of the *Montana* test must be read in the context of the rule to which it is an exception. That rule provides that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers," *Montana,* 450 U.S. at 565, but rather encompass only "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. Part of "what is necessary" to protect tribal self-government is the power of self-determination, *i.e.,* the power to enter into consensual agreements with nonmember entities. *See, e.g., Devils Lake Sioux Tribe v.*

North Dakota Pub. Serv. Comm'n, 896 F. Supp. 955, 961 (D.N.D. 1995). This power includes the lesser power to determine the terms upon which the tribe will do business with nonmember entities. Recognizing this, the *Montana* Court held that tribes "may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. at 566. Thus, tribal court jurisdiction should extend over those activities which arise out of a consensual relationship or in some way implicate the tribe's interests in such a relationship. This interpretation honors both the rule, which limits tribal jurisdiction, and the exception, which safeguards remaining attributes of tribal sovereignty.

Under such an analysis, jurisdiction over this tort action does not lie in tribal courts. This lawsuit is wholly unrelated to A-1's contract with LCM Corporation ("LCM"). No part of that agreement is relevant to the plaintiffs' prima facie case or to respondents' defenses. Similarly, the Tribe's sovereignty over its affairs or those of its members is not jeopardized by the conclusion that the tribal court lacks jurisdiction.

By contrast, finding a "consensual relationship" in this case sufficient to permit tribal court jurisdiction would allow a *Montana* exception to swallow the *Montana* rule. It would also be unworkable as a practical matter because the requisite nexus would result in an arbitrary assertion of jurisdiction by tribal courts over cases such as this one. Even assuming that A-1's contract with LCM was a necessary cause of Lyle Stockert's presence on the reservation on the day of the accident, *but see* Pet. App. 3a n.1, to base tribal court jurisdiction on a *but for* explanation of Stockert's presence would sweep into tribal court any cause of action based on any of Stockert's actions on the particular day. Thus applied, the limited exception posited by *Montana* would override the general rule—"that the inherent sovereign powers of Indian tribes do not extend to the activities of nonmembers." 450 U.S. at 565.

The "consensual relationship" prong of *Montana* would likewise be unduly expanded if this Court were to adopt the "reasonably foreseeable consequences" test advocated by petitioners. *See* Pet. Br. 28. What is needed in this area of the law is more, not less, certainty about the jurisdiction of tribal courts over nonmembers. *See Brendale*, 492 U.S. at 431 (plurality opinion).[7] Because of the "checkerboard ownership" of many reservation lands, *id.* at 430, persons working within a reservation's boundary, whether on tribal land or not, inevitably will have reasonably foreseeable contacts and involvement with each of one or more States, the federal government, and the tribe. What *Montana* recognizes, however, is that such overlapping, incidental contacts cannot, either in theory or in function, serve as a basis for putting tribal sovereignty on a par with the police power of a sovereign State or the enumerated powers of the federal government. *See Brendale*, 492 U.S. at 429 (plurality opinion). The tribes must be sovereign in matters of core importance to the tribes, while the plenary sovereign power of the state or federal government, as appropriate, extends to all other matters, and is exclusive. Accordingly, nonmembers whose activities bring them into contact with the tribes benefit from a "bright-line" principle which subjects them to regulation by the tribes not merely where their conduct has some reasonably foreseeable effect on the tribe, but where the tribe's interest is "direct." *See Montana*, 450 U.S. at 566.

Outside this limited category of activities, as to which nonmembers of tribes cannot but have notice of the tribe's interests, *Montana* protects a nonmember's reasonable expectations that it must answer only to the state and

[7] Economic development within reservation boundaries may be inhibited by a lack of certainty as to which law would apply. Those concerns would be ameliorated by focusing *Montana*'s consensual relationship exception on agreements between nonmembers and the tribe or tribal members respecting tribal lands or activities on such lands.

federal sovereigns. Thus, based on expectations, merely travelling on a state highway on or through a reservation would not trigger tribal jurisdiction. Similarly, travelling on a state highway on a reservation to visit a tribal-owned or sanctioned gambling casino would not by itself be sufficient to confer tribal jurisdiction.[8] *Montana* does not embrace such attenuated but-for concepts. Instead, the consensual relationship prong should address alleged harmful actions directed toward either the relationship or the tribe's sovereign right to determine the terms of that relationship. Under the proper analysis, there is no tribal jurisdiction in this case under the first *Montana* exception.

B. The Facts Underlying This Suit Do Not Threaten The Political Integrity, Economic Security, Or Health Or Welfare Of The Tribe

The second *Montana* exception may provide a basis for tribal courts to exercise jurisdiction over nonmembers where the conduct of nonmembers "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[9] *Montana*, 450 U.S. at 566. The impact of an accident of the type at issue in this case on the "health or welfare of the tribe" falls well short of the "direct effect" that may be required by *Montana*.

[8] *Amicus curiae* Shakopee Mdewakanton Sioux (Dakota) Community reportedly "operates a casino with a high volume of nonmember visitors" near the Twin Cities in Minnesota. Br. *Am. Cur.* Shakopee Mdewakanton Sioux (Dakota) Community, *et al.*, at 1. Similarly, *amicus curiae* Yavapai-Apache Nation operates the "Cliff Castle Casino and Montezuma Visitors' Center" on a reservation parcel located in northern Arizona. Br. *Am. Cur.* Yavapai-Apache Nation, *et al.*, at 3.

[9] Indeed, as construed in *Brendale*, the "direct effect" prong of *Montana* may not afford any basis for tribal authority over nonmembers. *See* Br. *Am. Cur.* States of Montana *et al.*, at 24-29, discussing *Brendale*, 492 U.S. at 428-31 (plurality opinion).

No member of the Tribe was involved in this accident; its immediate impacts were visited on citizens of the State of North Dakota. Ordinary interest analysis-based choice of law precepts would therefore dictate application of North Dakota law, on the ground that the Tribe has no interest in the outcome of a lawsuit between two nonmembers. *See Babcock v. Johnson,* 191 N.E.2d 279 (N.Y. 1963) (in suit between New York residents for injuries resulting from auto accident occurring in Ontario, New York court will not apply Ontario guest statute to bar recovery); *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985) (in suit between New Jersey domiciliaries for injuries inflicted in New York, New York court will apply New Jersey charitable immunity doctrine).

Nor is the exercise of jurisdiction by the Tribe necessary to protect an indirect interest in requiring that persons driving on the reservation use due care. That interest is sufficiently advanced by a tribal jurisdiction which is limited to disputes involving harm to tribal members, because, *ex ante,* no visitor to the reservation would know whether the potential victim of his or her tortious conduct would be a tribal member. *See* William F. Baxter, *Choice of Law and the Federal System,* 16 Stan. L. Rev. 1, 13 (1963) (in an accident between two residents of "State Y" occurring in "State X," loss-distributing laws of "State Y" should be applied; "State X" 's regulatory interest is not impaired because "[c]onduct on X highways will not be affected by knowledge of Y residents that the X [law] will not be applied to them if the person they injure happens to be a co-citizen").

Indeed, in arguing that the Tribe has "adjudicatory" jurisdiction separate from its "regulatory" powers, both the petitioners and the United States admit that the Tribe's interest in this case is sufficiently attenuated that the Tribe might simply apply North Dakota law. Pet. Br. 25-26; U.S. Br. 20-22. Such an approach, however, cannot be reconciled with the assertion that the case concerns a matter which has "some direct effect" on the "health or welfare of the tribe." *Montana,* 450 U.S. at 566.[10] Thus, neither the Tribe's existence, nor basic aspects of its retained sovereignty—such as the right to determine membership and govern internal affairs—are at stake. This is a personal injury tort suit between two nonmembers that should be decided under North Dakota law in a state court.[11]

The existence of highly qualified tribal courts is something in which the Tribe should take pride and for which those who aided their development should be commended. The qualifications of a court, however, do not justify expanding its jurisdiction. Rather, the scope and power of a tribal court is determined by the nature and breadth of tribal interests, as explicated in *Montana.* Such interests are not implicated in a dispute between two citizens of the State of North Dakota. In the absence of tribal interests, this Court should not supplant state authority by providing for tribal court jurisdiction over this personal injury case between nonmember citizens of the State of North Dakota.

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[10] Whether Gisela Fredericks was or was not a resident of the reservation is irrelevant. Ties of residency cannot be allowed to circumvent, by way of interest analysis, limitations that restrict the exercise of sovereignty to members.

[11] This is not to say that the mere existence of a tribal interest sufficient to permit application of tribal law under modern choice of law analysis would give rise to the sort of "direct effect" on the "health or welfare" of the tribe required by the *Montana* standard. Thus, in remanding for assessment by the tribal courts of the tribe's jurisdiction under *Montana,* both *National Farmers Union Ins. Cos.* and *Iowa Mutual* effectively concluded that the "direct effect" prong of *Montana* is not necessarily satisfied in a tort action (as opposed to a "consensual" contract action) even when the injured litigant is a member of the tribe. In the present case, however, which is a dispute between two nonmembers, the absence of even the sort of tribal interest relevant to choice of law principles plainly rules out the possibility of tribal jurisdiction under *Montana.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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